

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

AMERICAN LEGION POST #6

DECISION OF THE HEARING OFFICER

Appearances: Paul McEachern Esq., Attorney for the Claimant
Thomas M. Closson Esq., Attorney for the Employer

Nature of Dispute: RSA 275-E: 2 I (a) Whistleblowers' Protection Act

Employer: American Legion Post #6, 96 Islington St, Portsmouth, NH 03801

Date of Hearing: January 31, 2012

Case No.: 42478

BACKGROUND AND STATEMENT OF THE ISSUES

A claim was filed under the Whistleblowers' Protection Act with the Department of Labor on September 19, 2011. The Notice of Hearing was sent to both parties on January 11, 2012. The claimant is seeking re-instatement to her position, back pay and vacation time. The claimant is also seeking several issues that are Wage Claims and are not heard in a Whistleblowers' Protection Act appeal. There are two separate appeal routes so they are not heard together. This case is strictly on the Whistleblowers' Protection Act.

The claimant testified that she worked for the employer on two separate occasions. The last time she went back was in 2007 as a part-time employee. She was later moved into a full-time position. The claimant said that everything was going fine until there was a missing deposit. She reported this to the Steward and the missing deposit was later found. The other issue that came up was the balancing of the Lucky 7 program. This was a program licensed and issued by the State of New Hampshire for the enjoyment of the patrons of the employer. There was an internal rule that if the totals did not balance then anyone who worked on the program would have to make up the difference until balanced. When this was reported to the Department of Labor, the employer was told that they could not deduct from wages to cover the missing money needed to balance the program.

The claimant also testified that she had to deal with several complaints by patrons that went through the Steward. The Steward was the immediate supervisor of the claimant. However, issues of employment were often brought to the Grille Committee for advice. It was clear from the testimony that the Steward had the full authority to hire and fire.

Two Past Commanders of the Post testified that there were problems with the financial administration of the Lucky 7 game and although advice was given and changes requested, the administration of the game was up to the Steward and the Grille Committee.

The employer presented testimony that the issues raised by the claimant were addressed. The Lucky 7 game was controlled by the State of New Hampshire as far as issuing the game and collecting the amount due from the game. How the game was administered internally was up to the business and those rules changed several times.

The employer said that the claimant was dismissed because of complaints from several patrons and the fact that the claimant had been spoken to about her attitude. The employer feels that they addressed all of the internal procedures problems and none of these resulted in any discipline. The claimant was warned about her attitude and this is what led to the termination.

FINDINGS OF FACT

RSA 275-E: 2 I (a) No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location, or privileges of employment because:

a. The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States;

This section of the law protects employees when they report anything that they feel is a violation of law,

It is the finding of the Hearing Officer, based on the testimony and the filings of the parties, that the complaint is invalid. The claimant has the right to make reports of law violations and seek protection. In this case the claimant was protesting internal employer policies that were subject to change by the administrative procedures set up by the employer.

The issue of patron complaints puts the burden on the employer to deal with the issues. However, that burden, in an "at-will" state is up to the employer. The employer can discharge an employee at any time and for any reason. This is what was done here.

The testimony shows that there were internal problems with the "house" rules but these were dealt with and changed where needed. The claimant did address several issues that could be Wage Claims but these issues are not adjusted in a complaint under the Whistleblowers' Protection Act.

The employer testified credibly that the discharge was covered by New Hampshire being an "at-will" state. This law allows for an employer to terminate an employee at any time. In this case the employer used patron complaints to lead to the decision to terminate.

DECISION

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive analysis" on the evidence presented. Because of the circumstantial nature of the evidence alleged by the claimant, the analytical framework of a "pretext analysis" is appropriate. Under this analytical framework, the claimant has the initial

burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. she engaged in an act protected by the statute;
2. she suffered an action proscribed by the statute (discrimination/termination); and
3. there was a causal connection between the protected act she engaged in (her report of late pay and her mention of the Department of Labor) and the action she suffered as a result of that protected act (discrimination and termination).

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). This burden of proof is only one of production. The claimant retains the burden of proof to persuade. In response to the employer's rebuttal, the claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that her assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to her protected act.

The claimant did not bear her burden in the claim. The claim under the Whistleblowers' Protection Act is invalid.

The written statement received in the post hearing brief from the employer, was not factored into this decision.

Thomas F. Hardiman
Hearing Officer

Date of Decision: March 15, 2012

Original: Claimant

cc: Employer

Paul McEachern, Esq.
Shaines & McEachern, PA
282 Corporate Drive, PO Box 360
Portsmouth, NH 03802-0360

Thomas M. Closson, Esq.
Jackson Lewis LLP
100 International Drive Suite 363
Portsmouth, NH03801

TFH/all